STATE OF MICHIGAN

COURT OF APPEALS

PACIFIC INSURANCE COMPANY,

Plaintiff/Counter-defendant,

v

CORDOVA CHEMICAL COMPANY OF MICHIGAN, AEROJET GENERAL CORPORATION,

Defendants/Counter-plaintiffs/Cross-Plaintiffs/Appellants/Cross-Appellees,

and

CRANFORD INSURANCE COMPANY,

Defendant/Counter-plaintiff/Cross-defendant/Appellee/Cross-Appellant.

UNPUBLISHED
June 14, 2005

No. 248778
Muskegon Circuit Court
LC No. 87-023270-CK

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Cross-plaintiffs Cordova Chemical Company of Michigan and Aerojet General Corporation (Cordova/Aerojet) appeal as of right from an order granting summary disposition to cross-defendant Cranford Insurance Company (Cranford). We affirm.

This case has a lengthy history that dates back to 1977, when Cordova/Aerojet purchased land in Muskegon County that was polluted by its former owners. Cordova/Aerojet entered into an agreement with the Michigan Department of Natural Resources (MDNR) concerning cleanup procedures. Cordova/Aerojet secured an environmental impairment insurance policy from Cranford Insurance Company that was effective from May 1, 1980 to May 1, 1982. On September 29, 1980, the United States Environmental Protection Agency (USEPA) notified Cordova/Aerojet that it was a potentially responsible party (PRP) for the cleanup costs. Cordova/Aerojet obtained a similar insurance policy from Pacific Insurance Company (Pacific) that was effective from July 1, 1982 to July 1, 1983. On October 15, 1982, the USEPA sent

another PRP letter, and notified Cordova/Aerojet that if it did not perform the work, the USEPA would do so, and hold Cordova/Aerojet responsible for its costs.

In October 1987, Pacific filed a declaratory judgment action against Cordova/Aerojet. It alleged misrepresentation, and requested a determination of its liability under the policy. Cranford's counterclaim against Pacific and cross-claim against Cordova/Aerojet denied liability on its part. Cordova/Aerojet's counterclaim against Pacific and cross-claim against Cranford alleged that each insurer was obligated to defend and indemnify it. All parties then filed motions for summary disposition. After a hearing, the trial court issued an opinion in which it ruled that Pacific and Cranford were liable to Cordova/Aerojet. The trial court interpreted each policy's "other insurance" clause and concluded that the Cranford policy was solely an excess liability policy, and Pacific had to "assume the burden of first exhausting its limits."

After considering supplemental briefs and arguments, the trial court issued an additional opinion. The trial court concluded that this Court's decisions in *Farm Bureau Mutual Ins Co v Horace Mann Ins Co*, 131 Mich App 98; 345 NW2d 655 (1983), and *Mary Free Bed Hospital and Rehabilitation Center v Ins Co of North America*, 131 Mich App 105; 345 NW2d 658 (1984), applied to the present case. The trial court noted that in *Farm Bureau*, this Court recognized the majority view, which attempts to reconcile conflicting "other insurance" clauses, but adopted the minority view, also known as the *Lamb-Weston*[1] rule. *Farm Bureau*, *supra* at 102-103. Under that view, the conflicting clauses are declared "repugnant" and rejected, and each insurer's liability is pro-rated "based on the proportion of the combined policy limits represented by the limits of each insurer's policy." *Id*. at 103-104. The trial court adopted this approach and ruled that Pacific and Cranford were each liable for 50% of Cordova/Aerojet's expenses. The trial court declared its order based upon the two opinions to be a final judgment on all but the misrepresentation claims.

Pacific and Cranford appealed as of right from the trial court's order. In an unpublished per curiam opinion, this Court found the trial court's opinions to be "comprehensive, well-reasoned and an accurate resolution of the issues involved," and expressly adopted them. *Pacific Ins Co v Cordova Chemical Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 1990 (Docket Nos. 115185 and 115236), at 1-2. Our Supreme Court denied Pacific's and Cranford's applications for leave to appeal. *Pacific Ins Co v Cordova Chemical Co of Michigan*, 439 Mich 897; 478 NW2d 481 (1991). This Court stayed further proceedings until Cordova/Aerojet's dispute with the MDNR was resolved, or until further order. The trial court dismissed the case.

This Court resolved Cordova/Aerojet's dispute with the MDNR in 1995. See *Cordova Chemical Co v MDNR*, 212 Mich App 144; 536 NW2d 860 (1995). Pacific settled with Cordova/Aerojet in 1999. The former landowner's liability was also determined. See *Best Foods v Aerojet-General Corp*, 173 F Supp 2d 729 (WD Mich, 2001). The trial court reinstated Cordova/Aerojet's case against Cranford on March 15, 2002. Cordova/Aerojet filed an amended

---

[1] *Lamb-Weston, Inc v Oregon Automobile Ins Co*, 341 P2d 110, 118-119 (1959).

cross-claim against Cranford. A default was entered against Cranford after it failed to respond within twenty-one days as required by MCR 2.108(C). The trial court ruled that Cranford had failed to demonstrate good cause for setting aside the default, so the case proceeded on the issue of damages.

The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted Cranford's motion and denied Cordova/Aerojet's motion. The trial court rejected Cordova/Aerojet's claims that the law of the case doctrine applied, and stated, "[a] careful reading of St. Paul [*Fire & Marine Ins Co v American Home Assur Co*, 444 Mich 560, 564, 568-570; 514 NW2d 113 (1994)] makes it clear that the court may no longer automatically declare competing "other insurance" clauses repugnant without engaging in a careful scrutiny to honor the policies to the greatest extent possible." The trial court ruled that *St. Paul*, in which our Supreme Court adopted the majority view of interpreting "other insurance" clauses, was prevailing law that required reconciliation of the Cranford and Pacific clauses. The trial court reconciled the policies and ruled that the Cranford policy provided coverage for expenses exceeding the primary limits of the Pacific policy. The trial court ruled that settlement monies from both the MDNR and Pacific should be applied to Cordova/Aerojet's claimed damages before Cranford's liability is triggered. This appeal and cross-appeal followed.

On appeal, Cordova/Aerojet argues that this Court's 1990 opinion constituted the law of the case, and that the *St. Paul* decision does not constitute an intervening change in the law because our Supreme Court stated that it was not overruling this Court's decision in *Farm Bureau*. Cordova/Aerojet also contends that the precedential value of *Farm Bureau* and *Mary Free Bed* were not destroyed by our Supreme Court's decision in *St. Paul*. We find that the *St. Paul* decision constituted an intervening change of law and that it is unnecessary to address how this decision affected *Farm Bureau* and *Mary Free Bed*.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Whether the law of the case doctrine applies is a question of law that we also review de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

Under the law of the case doctrine, "as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Grievance Admin v Lopatin*, 462 Mich 235, 260, 612 NW2d 120 (2000). The law of the case doctrine applies to questions specifically determined in the prior decision and to questions necessarily determined to arrive at the prior decision, and applies without regard to the correctness of the prior determination. *Kalamazoo v Dept of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). However, the "doctrine is discretionary and expresses the practice of the courts generally; it is not a limit on their power." *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002) (citations omitted). The doctrine will not be applied if the facts of the case do not remain materially or substantially the same or if there has been an intervening change in the law. *Sumner v GMC (On Remand)*, 245 Mich App 653, 662; 633 NW2d 1 (2001); *South Macomb Disposal Authority v American Ins Co*, 243 Mich App 647, 654-655; 625 NW2d 40 (2000). The change in law must occur after the initial decision of the appellate court. *Ashker, supra* at 13.

At issue in the present case is whether the *St. Paul* decision constituted an intervening change in the law. Disputes similar to that in the present case arise when two or more insurance policies, which cover the same risk contain "other insurance" provisions such as "pro-rata" clauses, "escape" clauses, and "excess" clauses. *Pioneer State Mut Ins Co v TIG Ins Co*, 229 Mich App 406, 411-412; 581 NW2d 802 (1998). In *Pioneer State Mut Ins Co*, this Court provided the following regarding the methods for addressing these "other insurance clauses":

> "Two trends have evolved. The majority rule attempts to reconcile the competing provisions by discerning the parties' intent through an analysis of the clauses. See, e.g., *Jones v Medox*, 430 A2d 488 (DC App, 1981). Critics of this approach argue that it is circular and that the decision as to which clause is primary depends on which policy is read first. Thus some courts deem the provisions "mutually repugnant" and reject both clauses. *Lamb-Weston, Inc v Oregon Automobile Ins Co*, 219 Ore 110, 129; 341 P2d 110 (1958). Courts adopting this minority view . . . hold that liability must be prorated. *Id*. [*Pioneer State Mut Ins Co*, supra at 611, quoting *Federal Kemper Ins Co, Inc v Health Ins Administration, Inc*, 424 Mich 537, 543; 383 NW2d 590 (1986), overruled in part by *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358; 505 NW2d 820 (1993).]

In *St. Paul*, our Supreme Court addressed the prioritization of competing insurance policies containing "other insurance" clauses. The Court noted the disadvantages of the minority, or *Lamb-Weston*, rule, as discussed in *Jones*, *supra* 430 A2d at 492-493. *St. Paul*, *supra* at 576-577. The Court acknowledged that where identical excess clauses conflict, it may be necessary to declare the clauses irreconcilable because a literal interpretation of the clauses would leave the insured without coverage. *Id.* The Court also noted that where this situation is presented, most courts require that insurers apportion the liability, even under the majority view. *Id.* at 578. But the Court stated, "we are persuaded that the majority rule is the better choice and adopt it as the law of Michigan." *Id*. However, it further stated, "we express no opinion regarding the correctness of the *Farm Bureau* decision." *Id*. at 573 n 24.

Even if the *Farm Bureau* and *Mary Free Bed* decisions were not overruled, the decisions are not applicable to the present case. The *Farm Bureau* decision applied to conflicting pro-rata and excess "other insurance" clauses, while *Mary Free Bed* applied to conflicting excess "other insurance" clauses. The present case involves escape and excess "other insurance" clauses.[2] In

---

[2] "Escape" clauses provide that there shall be no liability if the risk is covered by other insurance, while "excess" clauses limit the insurer's liability to the amount of loss in excess of the coverage provided by the other insurance. *St. Paul*, *supra* 411. The Pacific "other insurance" clause can be categorized as an escape clause, while the Cranford "other insurance" clause can be categorized as an excess clause. The clauses are similar because they both purport to limit liability as an insurer in the event that the insured procures other insurance coverage. The clauses differ regarding their potential applicability *after* each insurer has already "escaped."
(continued…)

St. Paul, issued after the 1990 lower court decision in the present case, our Supreme Court provided "We do not view 'other insurance' clauses as being automatically irreconcilable and choose not to adopt a rule that requires this Court to automatically override the contractual language and perhaps, the negotiated intent of the parties." *Id*. at 578.

The Supreme Court adopted a rule as a part of Michigan law when lower courts had applied a different rule. We conclude that an intervening change in the law has occurred such that the law of the case doctrine is inapplicable to the present case. Further, we find that the Pacific and Cranford "other insurance" clauses are able to be reconciled under the majority rule by a literal reading of the policies. The trial court correctly applied the ruling from the *St. Paul* decision.

On cross-appeal, Cranford argues that the trial court erred when it denied Cranford's motion to set aside the default entered against it. We find that this issue is moot because we cannot provide any further relief to Cranford than that received by affirming the trial court's decision regarding the above issue. Thus, an event will have occurred which renders it impossible for this Court to grant relief. See *City of Warren v City of Detroit*, 261 Mich App 165, 165 n 1; 680 NW2d 57 (2004).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

(…continued)

Pacific's clause provides that its escape will be negated only when the other policy is specifically written as excess insurance. Cranford's clause provides that if, after it has "escaped," the insured's claims exceed the amount covered by the other insurance, it will assume responsibility for that excess.